IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1979

RECEIVED
NOV 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-5545

NORWOOD WHITE,
Appellant,

v.

THE STATE OF NEW JERSEY,
Appellee.

ORIGINAL COPY

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

The Appellee moves the Court to dismiss this appeal on the ground that no substantial question not previously decided by this Court has been raised.

JOHN J. DEGNAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR APPELLEE
STATE OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

JOHN J. DE CICCO
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
P.O. BOX CN 24
PRINCETON, NEW JERSEY 08540

OF COUNSEL

MARK PAUL CRONIN
DEPUTY ATTORNEY GENERAL

ON THE BRIEF

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. N.J.S.A. 2A:139-1

Appellant challenges the constitutionality of N.J.S.A. 2A:139-1 as violative of the Due Process clause of the Fourteenth Amendment. That statute, which was repealed by L. 1978, c. 95, § 2C:98-2, provided:

> Any person who receives or buys any goods or chattels, or choses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained, or converted contrary to law, whether the stealing or robbery was committed either in or out of this State, and whether the property was received or bought from the thief or robber, or from another person, or who receives, harbors or conceals any thief or robber knowing him to be so, is guilty of a high misdemeanor if the price or value of the property received or bought is $500.00 or more, and is guilty of a misdemeanor if the price or value of such property is in excess of $200.00 but less than $500.00.
>
> Possession of such property within 1 year from the date of such stealing, robbery or unlawful or fraudulent obtaining, shall be deemed sufficient evidence to authorize conviction, unless the accused show to the satisfaction of the jury either:
>
> a. That the property, considering the relations of the parties thereto ad the circumstances thereof, was a gift to him and not received by him from a minor under the age of 16 years; or
>
> b. That the amount paid by him for the property represented its fair and reasonable value and that it was not received by him from a minor under the age of 16 years; or
>
> c. That when he bought the property he knew or made inquiries sufficient to satisfy a resonable man, that the seller was in a regular and established business for dealing in property of the description of the property purchased; or
>
> d. That when he received or bought the property, he simultaneously with or before the receipt or sale, reported the transaction to the police authorities of the municipality in which he resided at the time of such receiving or buying and that the property was not received by him from a minor under the age of 16 years; or
>
> e. That before he received or bought the property from a minor under the age of 16 years, he first communicated with the police authorities of the municipality in which he resided and obtained their approval for the purchase, barter, exchange or receipt of possession thereof.

Proof of the crime of receiving stolen property required proof of intentional possession of the stolen property, knowledge that the property was stolen, and an intent to deprive the rightful owner of possession. State v. DiRienzo, 53 N.J. 360, 369, n.2, 251 A.2d 99, 103-104 (1969).

B. N.J.S.A. 2A:85-12

Petitioner claims that the habitual offender statute, N.J.S.A. 2A:85-12, offends the Sixth, Eighth and Fourteenth Amendments of the Constitution. That statute, which was repealed by L. 1978, c.95, § 2C:98-2, provided:

> Any person convicted on three separate occasions of high misdemeanors in this State, or of crimes under the laws of the United States or any other State or country, which crimes would be high misdemeanors under the laws of this State, or whose convictions for such offenses in this State or under the laws of the United States or any other State or country shall total three or more, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, is hereby declared to be a habitual criminal, and the court in

which such fourth or subsequent conviction is had, may impose upon the person so convicted a sentence in the State Prison for any term of years or for life.

Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

C. New Jersey Court Rule 2:11-3(e)(2)

Appellant's final claim is that R.2:11-3(e)(2) violates the Sixth and Fourteenth Amendments in that it denies due process and equal protection. The rule provides:

> When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

II.

THE PROCEEDINGS BELOW

The appellant, Norwood White, was convicted by a jury on June 17, 1975, of receiving stolen property valued between $200 and $500, contrary to the provisions of N.J.S.A. 2A:139-1. On November 18, 1975, appellant was adjudged to be a habitual offender pursuant to N.J.S.A. 2A:85-12. A sentence of not less than nine, nor more than twelve, years in the New Jersey State Prison, to be served consecutively to a term appellant was already serving, was imposed on November 18, 1975. A Notice of Appeal to the Superior Court of New Jersey, Appellate Division, was filed on January 2, 1975.

On September 22, 1978, the Superior Court, Appellate Division, affirmed appellant's conviction. The opinion recited each

of appellant's claims and found no merit to any of them, citing R.2:11-3(e)(2). Thereafter, a Notice of Petition for Certification to the Superior Court, Appellate Division, was filed in the New Jersey Supreme Court. That petition was denied by the Supreme Court on March 13, 1979. State v. White, 81 N.J. 45, 404 A.2d 1145 (1979). A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on June 11, 1979.

III.

STATEMENT OF THE CASE

On October 2, 1974, a color television, radio and some Halloween candy were stolen from the home of Hans Peter Thomsen. (T2-18 to 20).* The television was a Zenith with serial number 65741, which Mr. Thomsen purchased on November 23, 1971 for $450.45. (T3-6 to 17). Pursuant to an insurance claim for the theft, the Allstate Insurance Company paid Mr. Thomsen $350; this reimbursement was not itemized, but Mr. Thomsen estimated that the radio was worth $40 and the candy worth $10. (T4.11 to 17). Mr. Thomsen estimated that his television was worth between $300 and $320. (T5-1 to 4).

On November 21, 1974, approximately one and one-half months after the break-in at Mr. Thomsen's home, Lieutenat Peter Tirpok of the Flemington Police Department executed a search warrant at defendant's home. (T7-22 to 8-3). The television set stolen from Mr. Thomsen was found in defendant's living rocm. (T8-6 to 10-6).

Defendant testified that he bought the television at the flea market in Neshanic Station in late October or early November. (T18-1 to 11). Defendant stated that he paid $150 in cash for the

---

* "T" refers to the transcript dated June 17, 1975.

television, which was sold by a vendor who had various household goods on his table. Defendant said that he obtained a receipt for the television, but he lost it. (T18-14 to 20-1).

IV.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. The Inference Created by N.J.S.A. 2A:139-1, Which has been Repealed, That the Possessor Knew Property Was Stolen, When the Possession Occurs Shortly After the Theft of the Property, is Constitutional.

Appellant contends that statutory inference contained in N.J.S.A. 2A:139-1 is unconstitutional. That statute has been repealed, L. 1978, c.95, § 2C:98-2, effective September 1, 1979, and was not reenacted in New Jersey's new penal code. See N.J.S.A. 2C:20-7(a)(b). N.J.S.A. 2A:139-1 penalized the receipt of stolen property and provided that possession of stolen property within one year of the theft may be deemed sufficient evidence upon which to convict. See State v DiRienzo, 53 N.J. 360, 251 A.2d 99 (1969). The inference is permissive only; the jury may reject it or the trial court may withhold the case from the jury. Id. Nevertheless, appellant contends that the inference could not be constitutionally applied because it was not a fact of which a court in New Jersey could take judicial notice. In effect, appellant argues that the legislature may create only those statutory inferences which have the effect of putting facts before the jury of which a court could take judicial notice. This contention is frivolous and unworthy of this Court's attention.

In Barnes v. United States, 412 U.S. 837 (1973), this Court sustained a statutory inference very similar to that now under attack. Barnes had challengd as violative of due process the trial court's instruction to the jury that ordinarily it would be justfied in inferring from unexplained possession of recently stolen mail that the defendant possessed the mail with knowledge that it had been stolen. Id., 412 U.S. at 838. This Court reveiwed the cases of Turner v. United States, 395 U.S. 6 (1969); Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); and United States v. Gainey, 380 U.S. 63 (1965), and held that, whether the "rational connection," "more likely than not," or "reasonable doubt" standard was aplied, the inference being considered accorded with due process. Id., 412 U.S. at 841-847. This result was reached because the inference was deeply rooted in the common law, had been approved by many courts on many occasions and reflected accumulated common experience. Id.

The Barnes decision upheld the inference that the possessor of stolen property knew the property was stolen if possession occurred within a short time of the theft. This result was reached even though the most stringent test, that proof of the "evidentiary" or "basic" fact proved beyond a reasonable doubt the "ultimate" or "elemental" fact, was applied. Subsequently, however, this Court has clarified the circumstances which require use of a particular standard.

In County Court of Ulster County v. Allen, -- U.S. --, 99 S.Ct. 2213 (1979), it was held that if the inference is permissive, the party challenging it must demonstrate its invalidity as applied to him. Id. at 2224. "Because this permissive presumption leaves thetrier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination. Id.

In contrast, a mandatory presumption may not only affect the strength of the "no reasonable doubt" burden, but also its allocation. Therefore, it must be examined on its face to determine the extent to which the basic and elemental facts coincide. Id. at 2224-2225. In determining whether a particular inference is permissive or is a mandatory presumption, the jury instructions will generally be controlling. Id. at 2225, n.16.

In the present case the trial court instructed the jury that it could determine whether apellant knew that the television was stolen by considering all of the circumstances surrounding appellant's receipt and possession of the television. (T65-17 to 66-1). The court noted that the defense was that appellant purchased the television for $150 (T69-23 to 70-3), and that if the jury believed that explanation, it should acquit him. (T71-13 to 18). The court explained that the jury could infer that defendant knew the television was stolen from the fact that it was possessed

shortly after the theft (T60-18 to 67-6), but also told the jury that it was solely within their province whether the inference was valid in this case. (T67-7 to 20). The jury was explicitly told that this was "a permissible inference and not a mandatory inference, that is, you may accept or reject such inference after considering all of the other evidence in the case." (T68-25 to 9-3).

Appellee submits that in light of this Court's opinions in County Court of Ulster County v. Allen, supra, and Barnes v. United States, supra, appellant has utterly failed to present this Court with a substantial constitutional issue not hitherto resolved. For this reason, his appeal should be dismissed.

B. The Habitual Offender Statute, N.J.S.A. 2A:85-12, Is Constitutional.

Appellant contends that N.J.S.A. 2A:85-12, repealed effective September 1, 1979, by L. 1978, c.95, §2C:98-2, which provided for an increased penalty of any term of years or life imprisonment, is unconstitutional in that it coerced guilty pleas and constituted cruel and unusual punishment. These claims are unsupportable and have been rejected by this Court previously.

The first point to be stressed is that nothing in N.J.S.A. 2A:85-12 prohibited its application to a person who pleaded guilty instead of going to trial. On its face, it applied to "any person" convicted of three high misdemeanors. Further, N.J.S.A.

2A:85-13,* which set forth the procedures for applying the habitual offender laws, did not prohibit their aplication to those who pleaded guilty. Indeed, Worbetz v. Goodman, 47 N.J. Super. 391, 400-401, 136 A.2d 1,6 (App. Div. 1957), certif. den. 26 N.J. 245, 139 A.2d 471 (1958), cert. den. 357 U.S. 941 (1958), cert. den. and app. dism. 361 U.S. 38 (1959), provides an example of a defendant who pleaded guilty to both the substantive offense and the habitual offender accusation.

Moreover, even if it were true that a defendant could escape sentencing as an habitual offender by entering a plea of guilty to the substantive offense, that incentive to entering a guilty plea would suffer from no constitutional infirmity. Corbitt v. New Jersey, -- U.S. --, 99 S.Ct. 492 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Chaffin v. Stynchcombs, 412 U.S. 17

---

* N.J.S.A. 2A:85-13 provided:

> If at any time, before sentence, it shall appear that a person convicted of a misdemeanor or a high misdemeanor under the laws of this State has previously been convicted as set forth either in sections imposed upon a person convicted of such misdemeanor or high misdemeanor who had not previously been convicted as aforesaid, then the court shall direct the prosecutor of the county in which such conviction was had to file an accusation accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had, shall cause the said person to be brought before it and shall inform him of the allegations contained in such accusation and of his right to be tried as to the truth thereof, and shall require such person to plead to the accusation. If such person refuses to plead or remains silent or pleads not guilty, a not guilty plea shall be entered and a jury shall be impanelled to inquire whether said person is guilty as outlined in sections 2A:85-8, 2A:85-9 and 2A:85-12 of this Title, respectively.

(Continued)

(1973); Brady v. United States, 397 U.S. 742 (1970). In Bordenkircher this Court found no unconstitutional coercion to the entry of a guilty plea when the prosecutor, after defendant refused to plead guilty to a lesser offense, charged defendant as an habitual offender. In the instant case, the prosecutor had no discretion in charging a defendant pursuant to N.J.S.A. 2A:85-13. It is, therefore, specious to argue that an habitual offender accusation can be used to coerce guilty pleas.

Appellant also contends that the habitual offender statute constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. He premises this contention upon the fact that the sentencing court was vested with the discretion to impose a term of imprisonment of any term of years or life.

Habitual offender statutes have been enacted in all of the states and by the federal government, and have been sustained against claims of unconstitutionality by this Court. See, e.g., Spencer v. Texas, 385 U.S. 554, 559-560 (1967), reh. den. 386 U.S. 969 (1967). At one time, a habitual offender was subject to a

---

* (Cont'd)

> If the jury finds said person guilty or if he pleads guilty or non vult, the court may sentence him to the punishment prescribed in sections 2A:85-8, 2A:85-9 and 2A:85-12, as the case may be.
>
> The said person shall have the right to waive, in writing, the trial by jury provided in this section, and if he shall do so, the court, in its discretion, may accept the waiver and try and decide the issue without a jury, and if the said person is found guilty, the court may impose the same sentence as though said person had been found guilty by the jury.

mandatory term of life imprisonment under New Jersey law. See, In re Zee, 13 N.J. Super. 312, 80 A.2d 480 (Cty. Ct. 1951), aff'd 16 N.J. Super. 171, 84 A.2d 29 (App. Div. 1951), cert. den. 343 U.S. 931 (1952). The subsequent amendment of N.J.S.A. 2A:85-12 to make the life sentence discretionary was a humanizing development which recognized that not all fourth offenders should be sentenced to that maximum term. State v. McCall, 14 N.J. 538, 546-548, 103 A.2d 376, 380-381 (1954). This sentencing procedure, which allows the court to impose a sentence which appropriatly considers all of the aggravating and mitigating circumstances of a particular case, does not offend the Eighth Amendment. Cf. Woodson v. North Carolina, 428 U.S. 280 (1976).

In sum, N.J.S.A. 2A:85-12 did not infringe upon the right to jury trial by needlessly encouraging guilty pleas. Nor did it constitute cruel and unusual punishment to allow the court to impose a sentence other than life imprisonment. Appellant has failed to make a colorable argument that the habitual offender statute is unconstitutional and his appeal should, therefore, be dismissed.

C. New Jersey Court Rule R.2:11-3(e)(2) Does Not Deprive An Appellant Of Due Process of Law.

Appellant's final contention is that application of New Jersey Court Rule 2:11-3(e)(2), which allows the Superior Court, Appellate Division to specify that an issue raised on appeal has no merit without further comment, denied him due process and equal protection of law. This claim is frivolous.

While it is true that there can be no denial of equal protection or due process once a state grants appellate review, see, e.g., Norvell v. Illinois, 373 U.S. 420 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956), the right to appeal, and procedures to be utilized in connection therewith, are matters reserved to the state courts and legislatures, unless these procedures violate the Fourteenth Amendment. There appears to be no federal constitutional mandate with regard to procedures governing the length or contents of opinions filed by an appellate court. Indeed, the overwhelming number of the federal Circuit Courts of Appeals have rules permitting either the dismissal, upon review by the Court, of unmeritorious apeals, or the disposition of appeals without written opinions. See, U.S. Ct. of App. D.C. Cir. Rule 13(c), 28 U.S.C.A.; U.S. Ct. of App. First Cir. Rule 14, 28 U.S.C.A.; U.S. Ct. of App. Fourth Cir. Rule 7(b), 28 U.S.C.A.; U.S. Ct. of App. Fifth Cir. Rules 20, 21, 28 U.S.C.A.; U.S. Ct. of App. Sixth Cir. Rule 9(b), 28 U.S.C.A.; U.S. Ct. of App. Seventh Cir. Rule 35, 28 U.S.C.A.; U.S. Ct. of App. Eighth Cir. Rule 14, 28 U.S.C.A.; U.S. Ct. of App. Ninth Cir. Rule 21, 28 U.S.C.A.; U.S. Ct. of App. Tenth Cir. Rule 17, 28 U.S.C.A. These rules appear to be sanctioned by F.R.A.P. Rule 36, 28 U.S.C.A., which notes that a judgment may be entered without an opinion.

The purpose of R.2:11-3(e)(2) is to expedite the processing of criminal cases in the appellate court. Presler, Rules Governing the Courts of New Jersey (Gann Ed. 1979), Comment R.2:11-3(e)(2). Those Courts of Appeals which have adopted similar rules have noted that: "Because of the increase in filings, the court finds itself

unable to write opinions, or full opinions, in every case. The absence of such does not necessarily mean that the case is considered unimportant. It does mean that no new points of law, making the decision of general precedential value, are believed to be involved." U.S. Ct. of Appeals First Cir. Rule 14, 28 U.S.C.A.; also see, App. to U.S. Ct. of Appeals Eighth Cir. Rules, "Plan for Publication of Opinions," 28 U.S.C.A.

In short, the Superior Court, Appellate Division's use of R.2:11-3(e)(2) did not indicate that it failed to review the record and consider apellant's claims. To the contrary, after full reveiw and consideration it found no basis upon to which to reverse the conviction and no issue raised to be worthy of extended discussion. Appellant received all the process of law which was due him, and his appeal should, therefore, be dismissed.

V.

CONCLUSION

Appellee respectfully submits that the questions upon which this cause depends are so insubstantial as not to need further argument, and appellee therefore moves the Court to dismiss this appeal. Regarding this appeal as improvidently taken and treating appellant's jurisdictional statement as a petition for writ of certiorari, 28 U.S.C. 2103, it is respectfully submitted that certiorari should be denied for the reasons stated herein.

Respectfully submitted,

JOHN J. DEGNAN
ATTORNEY GENERAL OF NEW JERSEY

JOHN J. DE CICCO
DEPUTY ATTORNEY GENERAL

COUNSEL FOR THE STATE OF NEW JERSEY

MARK PAUL CRONIN
DEPUTY ATTORNEY GENERAL

ON THE BRIEF